90-766

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

GEORGE A. GUESS, M.D.,

Petitioner,

v.

NORTH CAROLINA BOARD
OF MEDICAL EXAMINERS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of North Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Was the North Carolina Board of Medical Examiners' decision to revoke Petitioner's medical license for prescribing safe and effective medicines permitted under the Federal Food, Drug and Cosmetic Act an improper and unconstitutional exercise of the police power?

II. Is the North Carolina Supreme Court's interpretation of the medical license revocation statute (N.C. Gen. Stat. § 90-14(a)(6) (1985)) unconstitutionally vague?

III. Does the statute as interpreted unconstitutionally invade Petitioner's liberty and/or privacy rights by prohibiting Petitioner from prescribing safe and effective medicines with the informed consent of his patients?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is George A. Guess, M.D., who was the subject of the action taken by the North Carolina Board of Medical Examiners that was the origin of this case.

Respondent is the Board of Medical Examiners of the State of North Carolina.

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Petitioner respectfully seeks a writ of certiorari to review the judgment and opinion of the North Carolina Supreme Court in *In re Guess, M.D.*, 327 N.C. 46, 393 S.E.2d 833 (1990).

The North Carolina Board of Medical Examiners ("Medical Board") conditionally revoked Dr. Guess' license solely because he was the only doctor in North Carolina using homeopathic drugs. The North Carolina Supreme Court, affirming that decision, held that the

state can revoke a doctor's license for prescribing medicines "not accepted and prevailing in North Carolina," even though the medicines are permitted by the Federal Food, Drug and Cosmetic Act and do not harm or threaten any harm to the doctor's patients or the public. The court held that the effectiveness of the drugs, their safety, and their widespread use by other physicians throughout the United States and the world was irrelevant. This decision violates the Due Process Clause of the Fourteenth Amendment by: (1) affirming an unlawful exercise of the police power with no relationship to a valid public purpose, (2) rendering the statute unconstitutionally vague and overbroad, and (3) impermissibly interfering with Dr. Guess' constitutional liberties and right to practice his profession even though he does not threaten his patients' health and public welfare.

OPINIONS BELOW

The opinion of the North Carolina Supreme Court and the Opinion of the North Carolina Court of Appeals which it reversed, 95 N.C. App. 435, 382 S.E.2d 459 (1989), are attached as Appendices A and B respectively. The Order entered by the superior court, *In re Guess, M.D.*, No. 89 CVS 510 (Superior Court, Wake County, N.C. May 20, 1987), is attached as Appendix C. The Findings of Fact, Conclusions of Law and Order of the North Carolina Board of Medical Examiners is attached as Appendix D.

The other proceedings below are the following:

(1) *In re Guess M.D.*, 89 N.C. App. 711, 367 S.E.2d 11 (1988) (dismissing appeal for lack of jurisdiction).

(2) *In re Guess M.D.*, 324 N.C. 105, 376 S.E.2d 8 (1989) (remanding to Court of Appeals for decision on the merits).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257 (Supp. 1990). This Petition for Certiorari is filed within ninety days of the date of entry of judgment, August 15, 1990.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment of the United States Constitution which provides in part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. IV, § 1, cl. 3.

The North Carolina statute at issue is N. C. Gen. Stat. § 90-14(a)(6)(1985), which provides in part:

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[1] The opinion of the Supreme Court of North Carolina was filed July 26, 1990. Under Rule 32(b) of the North Carolina Rules of Appellate Procedure, the actual judgment of the North Carolina Supreme Court is entered in the docket twenty (20) days after the date the opinion is filed.

90-14. Revocation, suspension, annulment or denial of license.

(a) The Board shall have the power to deny, annul, suspend, or revoke a license . . . issued by the Board to any person who has been found by the Board to have committed any of the following acts or conduct, or for any of the following reasons:

. . . .

(6) Unprofessional conduct, including, but not limited to, any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby . . . .

STATEMENT OF THE CASE

INTRODUCTION

The North Carolina Supreme Court held on July 26, 1990 that the North Carolina Board of Medical Examiners can revoke a physician's license for prescribing drugs permitted to be manufactured and distributed in interstate commerce under the Federal Food, Drug and Cosmetic Act solely on the grounds that other North Carolina physicians do not use those medicines. The court specifically held that the Board does not have to show that the physician's conduct poses any harm or threat of harm to the patient or the public. *In re Guess, M.D.*, 327 N.C. 46, 393 S.E.2d 833 (1990).

BACKGROUND

Petitioner, Dr. George A. Guess, is a fully licensed and qualified physician specializing in family medicine in Asheville, North Carolina. In his practice, Dr. Guess prescribes and administers homeopathic drugs as well as conventional or "allopathic" drugs.

Homeopathic drugs are listed in the Homeopathic Pharmacopoeia of the United States and are regulated and recognized under the United States Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 (1972 & Supp. 1990) *et seq. See also,* N.C. Gen. Stat. § 90-87(12)(1985). They are used to treat various types of illnesses and chronic diseases based on the "law of similars." In layman's terms, homeopathic drugs work on the theory that treatment with a very diluted amount of a substance that would cause the same symptoms as the patient's illness will help cure the illness by stimulating the body's own natural defenses to fight the disease. This is the same principle upon which certain "allopathic" or "conventional" drugs such as immunizations and allergy medicines work. *See* H. L. Coulter, *Homoeopathic Science and Modern Medicine* (1981). Homeopathic drugs are not toxic because they are so diluted and thus are preferred by many doctors as a healthier alternative to many allopathic remedies.

The Medical Board does not dispute that Dr. Guess is a capable licensed physician providing high quality care to his patients. The administrative action against him was not precipitated by any claim that a patient did not receive good medical care. Significantly the Board did not find that Dr. Guess' use of homeopathic drugs threatened

any harm to the public because of poor care, charlatanism, or otherwise.

Dr. Guess received his medical degree from the Medical College of Virginia in 1973, completed a three-year residency in family medicine at Southern Illinois University, and was board certified in family medicine from 1976 to 1978, when he chose not to renew certification. The North Carolina Board of Medical Examiners licensed Dr. Guess to practice medicine and surgery in North Carolina in 1978; he is also licensed in Virginia, California and Washington. He generally maintains 150 credits every three years of continuing medical education approved by the American Medical Association. In addition to his allopathic credentials, Dr. Guess has a diploma in homeopathic therapeutics from the American Board of Homeopathy. He regularly takes between 50 and 80 hours of homeopathic continuing medical education each year.

PROCEDURAL HISTORY

On June 25, 1985 the North Carolina Medical Board charged Dr. Guess with "unprofessional conduct [that] departs from and does not conform to the standards of acceptable and prevailing medical practice in the State of North Carolina."

The Medical Board conducted hearings on October 18 and December 2, 1985, at which the evidence established:

1. Homeopathic drugs are permitted, recognized and regulated under the Federal Food, Drug and Cosmetic Act.

2. Homeopathic drugs are widely used throughout the United States and in other countries, including Great

Britain (where the Queen's physician is a homeopathist), Belgium, France, Switzerland, the Netherlands, Austria, Pakistan, Mexico, Brazil and Argentina.

3. Homeopathic drugs are safe, non-toxic medications that are effective treatments for many diseases, especially chronic illnesses.

4. Dr. Guess uses homeopathic drugs in his practice only for illnesses that are appropriate for that type of medicine; when his patients require allopathic drugs or other care, Dr. Guess either administers them himself or refers the patient to an appropriate specialist.

5. Dr. Guess has successfully treated many patients with homeopathic drugs, including patients suffering from chronic illnesses that allopathic drugs did not help.

6. Dr. Guess has not harmed any patient by prescribing homeopathic drugs, has not deprived any person of necessary allopathic treatment, and has not engaged in any chicanery or other practice that could mislead his patients or the public.

Following the hearing, the Medical Board revoked Dr. Guess' medical license on the grounds that using homeopathic medicines was not "acceptable and prevailing" because other doctors in North Carolina did not use them. The Board, however, allowed Dr. Guess to keep his license so long as he refrains from prescribing homeopathic medicines in the future.

On appeal by Dr. Guess, the superior court reversed and vacated the Board's decision on May 20, 1987, holding that the Board's findings, conclusions and decision were not supported by competent, material and substantial evidence and were arbitrary and capricious. N. C. Gen. Stat. § 150B-51(b)(1986).

On the Medical Board's appeal, the court of appeals first dismissed the appeal for lack of jurisdiction. *In re Guess, M.D.*, 89 N.C. App. 711, 367 S.E.2d 11 (1988). The North Carolina Supreme Court reversed that decision and remanded the case to the court of appeals for determination of the issues. *In re Guess*, 324 N.C. 105, 376 S.E.2d 8 (1989). On remand, the court of appeals affirmed, on different grounds, the superior court's reversal of the Medical Board's decision, stating:

> [T]he Board neither charged nor found that Dr. Guess' departures from approved and prevailing medical practice either endangered or harmed his patients or the public, and in our opinion the revocation of a physician's license to practice his profession in this state must be based upon conduct that is detrimental to the public; it cannot be based upon conduct that is merely different from that of other practitioners.

In re Guess, M.D., 95 N.C. App. 435, 437, 382 S.E.2d 459, 461 (1989).

The North Carolina Supreme Court reversed the court of appeals. *In re Guess, M.D.*, 327 N.C. 46, 393 S.E.2d 833 (1990). The court rejected, *inter alia*, petitioner's constitutional claims, preserved at each level of the proceedings, that the Board's decision was an unconstitutional exercise of the police power, made the statute vague and overbroad, and violated petitioner's right to practice his profession without undue interference. *See*, Petitioner's Notice of Appeal from Medical Board's Decision and Revocation and Petition for Judicial Review, attached as Appendix E.

REASONS THE WRIT SHOULD ISSUE

I. PROHIBITING A LICENSED PHYSICIAN FROM PRESCRIBING SAFE AND EFFECTIVE MEDICINES THAT ARE PERMITTED UNDER THE FEDERAL FOOD, DRUG AND COSMETIC ACT SOLELY BECAUSE OTHER NORTH CAROLINA PHYSICIANS DO NOT USE THOSE MEDICINES IS AN INVALID EXERCISE OF THE POLICE POWER.

The North Carolina Supreme Court specifically held that it does not matter how safe, effective and widely used a medical practice is – if enough other doctors in North Carolina are not doing it that way, then it is not "acceptable and prevailing," and is therefore prohibited. This is not a case where the petitioner claims that a hypothetical interpretation of the statute is unconstitutional. The court's application in this case exceeds the proper exercise of the police power permitted under the Due Process Clause.

A state legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. *Lawton v. Steele*, 152 U.S. 133, 137, 14 S.Ct. 499, 38 L.Ed. 385 (1894). If a statute is to be sustained as a legitimate exercise of the police power, it must have a reasonable and substantial relation to the public health, morals, order, or safety, or the general welfare. *See, e.g., Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (striking down ordinance limiting occupancy of a dwelling unit to members of the nuclear family); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (striking down state law prohibiting the teaching of foreign languages to school

children); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) (a law license requirement must have a rational connection with the applicant's fitness or capacity to practice law – "Mere unorthodoxy [in the field of political and social ideas] does not as a matter of fair and logical inference, negative 'good moral character.' ").

The North Carolina statute – as specifically interpreted and applied by the North Carolina Supreme Court in this case – fails this test.

Dr. Guess does not challenge the general right of the state to regulate medical care through a medical licensing board. Licensing and disciplinary statutes have long been recognized as an appropriate way for the state to protect the public from substandard care and fraudulent claims. *Dent v. West Virginia*, 129 U. S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889). Such statutes and regulations are constitutionally permissible precisely because they protect and promote the general welfare of the public. Dr. Guess has complied with the licensing requirements of four states, including North Carolina. His medical competency and integrity is not at issue.

The statute here is different. It purports to prohibit a qualified licensed physician from properly prescribing legal medications for the benefit of his patients when there is *no* risk of harm to the patient or the public. The statute imposes a substantial restriction on doctors and their patients without any rational relationship to a public purpose. This the state may not do.

The North Carolina Supreme Court, acknowledging that there was no evidence that Dr. Guess ever harmed a

patient or endangered the public, nonetheless sought to articulate the following "general risk":

> [T]he legislature, in enacting N.C. Gen. Stat. § 90-14(a)(6), reasonably believed that a general risk of endangering the public is *inherent* in *any* practices which fail to conform to the standards of "acceptable and prevailing" medical practice in North Carolina . . . By authorizing the Board to prevent or punish *any* medical practice departing from acceptable and prevailing standards, irrespective of whether a patient is injured thereby, the statute works as a regulation which "tend[s] to secure" the public generally "against the consequences of ignorance and incapacity as well as of deception and fraud," even though it may not immediately have that direct effect in a particular case. *See Dent v. West Virginia*, 129 U.S. at 122, 32 L.Ed. at 626. Therefore, the statute is a valid exercise of the police power.

In re Guess, M.D., 327 N.C. 46, 52-53, 393 S.E.2d 833, 837 (1990) (Frye, J., dissenting). Reduced to essentials, the court's premise is that "different" is "inherently dangerous." This is not true. No state can ban conduct solely on the grounds that it is "different." The Due Process Clause protects against just this type of arbitrary exercise of police power.

The present case clearly demonstrates the fallacy of the court's rationale. Homeopathic drugs are legal, safe and effective. Dr. Guess uses homeopathic drugs only after (1) careful evaluation of his patients to determine the suitability of the drugs, (2) full disclosure to his patients, and (3) receiving informed consent from his patients. Most of his patients are suffering from chronic illnesses which allopathic drugs have not helped. If homeopathic drugs are not appropriate, Dr. Guess either administers the appropriate allopathic treatment or refers

the patient to another physician. Similarly, if at any time during the course of treatment with homeopathic drugs a different course of treatment is required, Dr. Guess initiates the appropriate change. As Justice Frye stated in his dissenting opinion:

> [A]ll of the evidence tended to show that Dr. Guess is a highly qualified practicing physician who uses homeopathic medicines as a last resort when allopathic medicines are not successful . . . The homeopathic medications prescribed by him are listed in the Homeopathic Pharmacopoeia of the United States and are regulated by the United States Federal Food, Drug and Cosmetic Act. The homeopathic approach is often preferred, in Dr. Guess' words, "primarily because of its well documented safety." This is not a case of a quack beguiling the public with snake oil and drums, but a dedicated physician seeking to find new ways to relieve human suffering . . . Nothing in the record before the Board or this Court justifies so broad a sweep in order to secure the public "against the consequences of ignorance and incapacity as well as of deception and fraud." *See, Dent v. West Virginia*, 129 U.S. 114, 122, 32 L.Ed. 623, 676 (1889).

In re Guess, M.D., 327 N.C. at 60, 393 S.E.2d at 841.

Significantly, the majority rejected as "irrelevant" the proof that many doctors throughout the United States and the world use homeopathic drugs and that they are safe and effective treatments for many kinds of disease. The court simply closed the borders of North Carolina to licensed physicians (and their patients) wishing to use homeopathic drugs by permitting the Medical Board to ban their use because they are "different" or "unconventional."

Any medical practice – whether it is "prevalent" or "unconventional" – is a proper target for state action if it has a tendency to deceive or harm the ignorant or incapacitated. But "prevalence" is not a proper litmus test for "public welfare." "Different" is not "inherently dangerous."

Prohibiting Dr. Guess from beneficially treating his patients with homeopathic drugs is a substantial interference in the autonomy of his medical practice without any public welfare justification. This is an invalid exercise of the police power.

II. WITHOUT THE REQUIREMENT OF SOME HARM OR THREAT OF HARM TO THE PUBLIC THE STATUTE IS UNCONSTITUTIONALLY VAGUE.

A statute sanctioning a licensed physician for using medical practices that are not harmful merely on the grounds that the practices are not "prevailing" is unconstitutionally vague. Vague statutes are prohibited by the Due Process Clause.

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc

> and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222, 227-28 (1972) (citations omitted); *see also, Peckmann v. Thompson*, No. 89-2344, ___ F. Supp. ___, 1990 WL 137584 (C.D. Ill. Sept. 19, 1990). The statute as interpreted in this case offends each of those values.

First, the term "acceptable and prevailing" is not defined. The court held that it did not mean the quality of care provided. The Medical Board did not find that Dr. Guess provided substandard care to his patients, even when using homeopathic drugs. The only thing "unacceptable" about his practice was that using homeopathic drugs was not "prevailing" because other North Carolina doctors did not use them.

"Prevailing" is a general quantitative term not defined by the statute or the court. If "prevailing" means that at least 51% of North Carolina physicians must use a particular kind of treatment, then 49% of physicians could be in violation of the statute at any given time. If "prevailing" only means that a substantial number of physicians must use the treatment, then what constitutes a "substantial" number? Any good physician reviews the current literature to stay abreast of recent developments, but how is he to know if enough North Carolina doctors will simultaneously begin using a new or different treatment to meet the "prevailing" threshold? This undefined term does not provide fair warning of what is lawful and unlawful.

Moreover, this standard is arbitrary because the court gives the Medical Board unfettered discretion to determine when something is "prevailing." For example, the court's interpretation would logically prohibit all new and innovative medical practices. By definition such treatments are a "departure from" and "failure to conform to" prevailing practices. Yet the court and the Board deny that result:

> [S]uch new practices simply must be achieved by "acceptable and prevailing" methods of medical research, experimentation, testing, and approval by the appropriate regulatory or professional bodies.

In re Guess, M.D., 327 N.C. at 56, 393 S.E.2d at 839. How can a doctor know when a "non-prevailing" practice has been transformed by research, testing and approval into a "prevailing" practice?

This case shows that the physician cannot reasonably predict when a practice is prevailing. Homeopathy is a widely accepted method of medical treatment that has been subjected to research and testing and been found safe and effective. It is also approved by many regulatory professional bodies, including a nationwide professional association and three separate state licensing boards. But the Medical Board ignored this evidence and the court held that the evidence was "irrelevant." Thus the doctor cannot even determine when evidence of the standard will be allowed, much less when the standard has been met. As Justice Frye noted in his dissent:

> I also disagree with the majority's conclusion that Dr. Guess' evidence presented to the Board concerning the efficacy of homeopathy and its use outside North Carolina was not relevant to the issue before the Board. North Carolina does

> not and should not exist as an island to itself. The evidence that homeopathy is accepted in other states and in other countries of the world and that it has a beneficial rather than harmful effect certainly ought to be of some significance to the Board and to the citizens of this State concerned about the public health and safety. The majority rejects evidence of the legitimacy of homeopathy in other states and countries throughout the world as being irrelevant because homeopathy is not currently an acceptable and prevailing system of medical practice in North Carolina. This raises the legitimate question of how the acceptable and prevailing practice can be approved in North Carolina if we do not even consider what happens in other states and countries.

Id. at 60, 393 S.E.2d at 841. The court makes the Medical Board the sole arbiter of determining – with or without evidence – when "unacceptable and non-prevailing" really means "acceptable and prevailing." Consequently, the doctor is at the mercy of the Medical Board to decide on an ad hoc and subjective basis whether a practice is prevailing.

A narrower construction of the statute, requiring evidence of harm or potential harm to the public, would fully protect the public and give the doctor a reasonably objective standard for determining what is prohibited without infringing on his right to employ a different or new treatment that is beneficial to his patients. Yet the North Carolina Supreme Court rejected that interpretation and held that "acceptable and prevailing" was the sole test irrespective of the issue of harm. This interpretation is unconstitutionally vague.

III. PROHIBITING A LEGAL MEDICAL PRACTICE CHOSEN BY A LICENSED PHYSICIAN THAT THREATENS NO HARM TO THE PUBLIC IS AN UNCONSTITUTIONAL INVASION OF THE PHYSICIAN'S LIBERTY AND/OR PRIVACY RIGHTS.

The state has deprived Dr. Guess of his liberty and/or privacy right to practice responsible medicine, without any valid public purpose.

Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), recognized that a physician's right to use his own best judgment in the practice of his profession is protected by the Fourteenth Amendment. Similarly, the majority in *Cruzan v. Missouri Department of Health*, ___ U.S. ___, 110 S.Ct. 2841, 111 L.Ed.2d 224, 58 U.S.L.W. 4916 (1990), recognized that a person has the constitutional liberty to refuse life-sustaining medical treatment. Under the rationale of that decision, a person has the constitutional liberty to choose beneficial medicines permitted by the Federal Food, Drug and Cosmetic Act. Conversely, a doctor must have the constitutional right to provide such treatment if the patient's liberty interest is to have any validity. *See also, Andrews v. Ballard*, 498 F.Supp. 1038 (S.D. Tex. 1980) (decision to obtain or reject medical treatment encompassed within the right of privacy – statute restricting acupuncture to licensed physicians declared unconstitutional because it deprived the public of that form of treatment).

In *Doe v. Bolton, supra*, a statute subjecting a physician's individual medical judgment to committee approval and the confirming consultation of two other doctors impermissibly infringed the physician's right to practice his profession, and had no rational connection

with a patient's needs. The North Carolina statute, subjecting a physician's choice of treatment to the Medical Board's judgment regarding "prevalence" without requiring any potential harm, is a far greater infringement than in *Bolton*. *See also, Akron v. Akron Center for Reproductive Health*, 462 U. S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (invalidating provisions of abortion ordinance infringing on physician's treatment of his patients).

The court's decision is a drastic interference with Dr. Guess' and all other physicians' constitutional rights and liberties that can only be justified and tolerated in the interest of protecting public welfare. The Medical Board acted without any purpose of protecting the public, therefore its actions are unconstitutional.

CONCLUSION

As set forth above, the statute permitting revocation of a physician's license to practice medicine without any requirement to show some harm or threat of harm to the public is (1) an improper and invalid exercise of the police power, (2) unconstitutionally vague and overbroad and (3) an unconstitutional infringement of the physician's liberty and/or privacy interests. For these reasons, this Honorable Court should grant the petition for a writ of certiorari.

This the 12th day of November, 1990.

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APPENDIX A

IN THE SUPREME COURT

IN RE GUESS

[327 N.C. 46 (1990)]

IN RE: GEORGE A. GUESS, M.D., RESPONDENT

No. 431PA89

(Filed 26 July 1990)

Justice FRYE dissenting.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 95 N.C. App. 435, 382 S.E.2d 459 (1989), affirming an order entered by *Farmer, J.*, on 20 May 1987 in Superior Court, WAKE County. Heard in the Supreme Court on 11 April 1990.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael E. Weddington and Susan M. Parker, for the complainant appellant Board of Medical Examiners of the State of North Carolina.

Manning, Fulton & Skinner, by Charles E. Nichols, Jr., for the respondent appellee George A. Guess, M.D.

MITCHELL, Justice.

At issue in this case is whether the Court of Appeals erred in affirming a Superior Court order which reversed and vacated a decision of the Board of Medical Examiners of the State of North Carolina conditionally revoking the respondent appellee's medical license. We conclude that the Court of Appeals did err in this regard, and we reverse its holding.

The facts of this case are essentially uncontested. The record evidence tends to show that Dr. George Albert Guess is a licensed physician practicing family medicine in Asheville. In his practice, Guess regularly administers homeopathic medical treatments to his patients. Homeopathy has been defined as:

> A system of therapy developed by Samuel Hahnermann on the theory that large doses of a certain drug given to a healthy person will produce certain conditions which, when occurring spontaneously as symptoms of a disease, are relieved by the same drug in small doses. This [is] . . . a sort of "fighting fire with fire" therapy.

Stedman's Medical Dictionary 654 (24th ed. 1982); *see* Schmidt's Attorneys' Dictionary of Medicine H-110 (1962). Homeopathy thus differs from what is referred to as the conventional or allopathic system of medical treatment. Allopathy "employ[s] remedies which affect the body in a way *opposite* from the effect of the disease treated." Schmidt's Attorneys' Dictionary of Medicine A-147 (emphasis added); *see* Stedman's Medical Dictionary 44.

The Board of Medical Examiners of the State of North Carolina (herein Board) is a legislatively created body established "to properly regulate the practice of medicine and surgery." N.C.G.S. § 90-2 (1985). On 25 June 1985, the Board charged Dr. Guess with unprofessional conduct, pursuant to N.C.G.S. § 90-14(a)(6), specifically based upon his practice of homeopathy. In a subsequent Bill of Particulars, the Board alleged that in his practice of medicine, Guess utilized "so-called 'homeopathic medicines' prepared from substances including, but not limited to, moss, the night shade plant and various other animal,

vegetable and mineral substances." The Board further alleged that the use of homeopathic medicines "departs from and does not conform to the standards of acceptable and prevailing medical practice in the State of North Carolina." *See* N.C.G.S. § 90-14(a)(6) (1985).

Following notice, a hearing was held by the Board on the charge against Dr. Guess. The hearing evidence chiefly consisted of testimony by a number of physicians. Several physicians licensed to practice in North Carolina testified that homeopathy was not an acceptable and prevailing system of medical practice in North Carolina. In fact, there was evidence indicating that Guess is the only homeopath openly practicing in the State. Guess presented evidence that homeopathy is a recognized system of practice in at least three other states and many foreign countries. There was no evidence that Guess' homeopathic treatment had ever harmed a patient, and there was anecdotal evidence that Guess' homeopathic remedies had provided relief to several patients who were apparently unable to obtain relief through allopathic medicine.

Following its hearing, the Board revoked Dr. Guess' license to practice medicine in North Carolina, based upon findings and conclusions that Guess' practice of homeopathy "departs from and does not conform to the standards of acceptable and prevailing medical practice in this State," thus constituting unprofessional conduct as defined and prohibited by N.C.G.S. § 90-14(a)(6). The Board, however, stayed the revocation of Guess' license for so long as he refrained from practicing homeopathy.

Guess appealed the Board's decision to the Superior Court, Wake County, pursuant to N.C.G.S. § 90-14.8. On 17 January 1986, the Superior Court stayed the Board's decision pending judicial review. After review, the Superior Court entered an order on 20 May 1987 which reversed and vacated the Board's decision. The Superior Court found and concluded that Guess' substantial rights had been violated because the Board's findings, conclusions and decision were "not supported by competent, material and substantial evidence and [were] arbitrary and capricious."

The Board appealed the Superior Court's order to the Court of Appeals, which dismissed the appeal for lack of jurisdiction. *In re Guess*, 89 N.C. App. 711, 367 S.E.2d 11 (1988). This Court reversed that decision and remanded this case to the Court of Appeals for its determination of the issues raised by the appeal. *In re Guess*, 324 N.C. 105, 376 S.E.2d 8 (1989). On remand, the Court of Appeals rejected the Superior Court's reasoning to the effect that the Board's findings, conclusions and decision were not supported by competent evidence. *In re Guess*, 95 N.C. App. 435, 437, 382 S.E.2d 459, 461 (1989). The Court of Appeals, nonetheless, affirmed the Superior Court's order reversing the Board's decision,

> because the Board neither charged nor found that Dr. Guess' departures from approved and prevailing medical practice either endangered or harmed his patients or the public, and in our opinion the revocation of a physician's license to practice his profession in this state must be based upon conduct that is detrimental to the public; it cannot be based upon conduct that is merely different from that of other practitioners.

Id. at 437, 382 S.E.2d at 461. We granted the Board's Petition for Discretionary Review, and now reverse the Court of Appeals.

I.

The statute central to the resolution of this case provides in relevant part:

> § 90-14. Revocation, suspension, annulment or denial of license.
>
> (a) The Board shall have the power to deny, annul, suspend, or revoke a license . . . issued by the Board to any person who has been found by the Board to have committed any of the following acts or conduct, or for any of the following reasons:
>
> . . . .
>
> (6) Unprofessional conduct, including, but not limited to, *any departure* from, or the failure to conform to, the *standards of acceptable and prevailing medical practice,* or the ethics of the medical profession, *irrespective of whether or not a patient is injured thereby.* . . .

N.C.G.S. § 90-14 (1985) (emphasis added). The Court of Appeals concluded that in exercising the police power, the legislature may properly act only to protect the public from harm. *In re Guess,* 95 N.C. App. at 437-38, 382 S.E.2d at 461. Therefore, the Court of Appeals reasoned that, in order to be a valid exercise of the police power, the statute must be construed as giving the Board authority to prohibit or punish the action of a physician only when it can be shown that *the particular action in question* poses a danger of harm to the patient or the public. *Id.* Specifically, the Court of Appeals held that:

> Before a physician's license to practice his profession in this state can be lawfully revoked under G.S. 90-14(a)(6) for practices contrary to acceptable and prevailing medical practice that *it must also appear that the deviation complained of posed some threat of harm to either the physician's patients or the public.*

Id. at 438, 382 S.E.2d at 462 (emphasis added).

The Board argues, and we agree, that the Court of Appeals erred in construing the statute to add a requirement that each particular practice prohibited by the statute must pose an actual threat of harm. Our analysis begins with a basic constitutional principle: the General Assembly, in exercising the state's police power, may legislate to protect the public health, safety and general welfare. *See, e.g., Treants Enterprises, Inc. v. Onslow County,* 320 N.C. 776, 360 S.E.2d 783 (1987); *Martin v. Housing Corp.,* 277 N.C. 29, 175 S.E.2d 665 (1970); *Shelby v. Power Co.,* 155 N.C. 196, 71 S.E. 218 (1911). When a statute is challenged as being beyond the scope of the police power, the statute will be upheld unless it has no rational relationship to such a legitimate public purpose. *See, e.g., In re Hospital,* 282 N.C. 542, 193 S.E.2d 729 (1973); *Surplus Stores, Inc. v. Hunter,* 257 N.C. 206, 125 S.E.2d 764 (1962); *Skinner v. Thomas,* 171 N.C. 98, 87 S.E. 976 (1916).

Turning to the subject of this case, regulation of the medical profession is plainly related to the legitimate public purpose of protecting the public health and safety. *See Board of Medical Examiners v. Gardner,* 201 N.C. 123, 127, 159 S.E. 8, 10 (1931). State regulation of the medical profession has long been recognized as a legitimate exercise of the police power. As the Supreme Court of the United States has pointed out:

> The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure *or tend to secure* them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely. . . . The nature and extent of the qualifications required must depend primarily upon the judgments of the States as to their necessity. . . .
>
> Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend. . . . The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Everyone may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possess the requisite qualifications. . . . The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected.

Dent v. West Virginia, 129 U.S. 114, 122-23, 32 L. Ed. 623, 626 (1889) (emphasis added); *see also, e.g., Barsky v. Board*

of Regents, 347 U.S. 442, 449, 98 L. Ed. 829, 838 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there.").

The provision of the statute in question here is reasonably related to the public health. We conclude that the legislature, in enacting N.C.G.S. § 90-14(a)(6), reasonably believed that a general risk of endangering the public is *inherent* in *any* practices which fail to conform to the standards of "acceptable and prevailing" medical practice in North Carolina. We further conclude that the legislative intent was to prohibit any practice departing from acceptable and prevailing medical standards without regard to whether the particular practice itself could be shown to endanger the public. Our conclusion is buttressed by the plain language of N.C.G.S. § 90-14(a)(6), which allows the Board to act against *any* departure from acceptable medical practice "irrespective of whether or not a patient is injured thereby." By authorizing the Board to prevent or punish *any* medical practice departing from acceptable and prevailing standards, irrespective of whether a patient is injured thereby, the statute works as a regulation which "tend[s] to secure" the public generally "against the consequences of ignorance and incapacity as well as of deception and fraud," even though it may not immediately have that direct effect in a particular case. *See Dent v. West Virginia*, 129 U.S. at 122, 32 L. Ed. at 626. Therefore, the statute is a valid exercise of the police power.

We next address a related question, whether the statute, N.C.G.S. § 90-14(a)(6), properly delegates authority to the Board. We have previously recognized that the

legislature may delegate certain authority, such as adjudicative and rule-making functions, to administrative bodies. *See Adams v. Dept. of N.E.R. and Everett v. Medical Examiners v. Gardner*, 201 N.C. 123, 159 S.E. 8. However, the legislature may not give unfettered discretion to the administrative body, but must instead provide "adequate guiding standards to govern the exercise of the delegated powers." *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.* 295 N.C. at 697, 249 S.E.2d at 410 (citing cases). Regarding this level of guidance which the legislature must provide to administrative bodies, we have held that:

> When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.

Id. at 698, 249 S.E.2d at 411.

Certain aspects of regulating the medical profession plainly require expertise beyond that of a layman. Our legislature recognized that need for expertise when it created a Board of Medical Examiners composed of seven licensed physicians and one additional member. N.C.G.S. § 90-2 (1985). Examining the language of N.C.G.S. § 90-14(a)(6), we conclude that the legislature clearly wished to protect the public from "unprofessional conduct" by physicians, and gave as an example of such conduct that which does not conform to the "standards of

acceptable and prevailing medical practice." The statutory phrase "standards of acceptable and prevailing medical practice" is sufficiently specific to provide the Board – comprised overwhelmingly of expert physicians – with the "adequate guiding standards" necessary to support the legislature's delegation of authority.

The statute in question is a valid regulation which generally tends to secure the public health, safety, and general welfare, and the legislature has permissibly delegated certain regulatory functions connected with that valid exercise of the police power to the Board. There is no requirement, however, that every action taken by the Board specifically identify or address a particular injury or danger to any individual or to the public. It is enough that the statute is a valid exercise of the police power for the public health and general welfare, so long as the Board's action is in compliance with the statute. The Court of Appeals thus erred in requiring a showing of potential harm from the particular practices engaged in by Dr. Guess as a prerequisite to Board action, and for that reason the Court of Appeals' decision is reversed.

II.

Having determined that N.C.G.S. § 90-14(a)(6) does not require that an unacceptable practice by a physician pose a particular threat of public harm before the Board may take action against that physician, we next consider whether the Board's action in this case was otherwise within its statutory authority. We first must decide whether the Board's decision in this case was supported by "competent, material, and substantial evidence."

N.C.G.S. § 90-14.10 (1985). Judicial review of a decision by the Board of Medical Examiners is made according to what is frequently referred to as the "any competent evidence" standard. *See In re Rodgers*, 297 N.C. 48, 64 n.4, 253 S.E.2d 912, 922 n.4 (1979). The Superior Court found that the Board's decision was not supported by "competent, material and substantial" evidence. On this issue, however, we agree with the Court of Appeals:

> The Superior Court's findings and conclusions as to the Board's findings of fact have no basis, as the Board's principal findings of fact are not only supported by competent evidence, they are essentially undisputed. Dr. Guess himself testified that he frequently used homeopathic medicines in treating patients, several qualified North Carolina physicians testified that such use is contrary to the "standards of acceptable and prevailing medical practice" in this state, and no doctor testified otherwise; indeed, so far as the record indicates Dr. Guess is the only physician in North Carolina that administers homeopathic medicines to patients.

In re Guess, 95 N.C. App. 435, 437, 382 S.E.2d 459, 461 (1989).

Findings by the Board of Medical Examiners, if supported by competent evidence, may not be disturbed by a reviewing court. Further, "[j]udicial review of a revocation of license by order of the Board does not authorize the reviewing court to substitute its discretion for that of the Board." *In re Wilkins*, 294 N.C. 528, 545, 242 S.E.2d 829, 830 (1978) (citations omitted), *criticized on other grounds by In re Guess*, 324 N.C. 105, 376 S.E.2d 8 (1989). Dr. Guess argues that the Board must show a specific risk of harm resulting from his homeopathic practices before

it may interfere with them and that, since no such risk was shown, the Board's decision could not be based upon competent evidence. As we have already rejected his underlying premise, his argument here is likewise rejected. The Board's findings leading to its decision were based upon competent, material, and substantial evidence regarding what constitutes "acceptable and prevailing" standards of medical practice in North Carolina. No more was required. Guess' evidence concerning the efficacy of homeopathy and its use outside North Carolina simply was not relevant to the issue before the Board.

Dr. Guess also contends that the Board's decision was arbitrary and capricious and, therefore, must be reversed under N.C.G.S. § 90-14.10. He argues that the Board's arbitrariness is revealed in its "selective" application of the statute against him. He seems to contend that if the Board is to take valid action against him, it must also investigate and sanction every physician who is the "first" to utilize any "new" or "rediscovered" medical procedure. We disagree. The Board properly adhered to its statutory notice and hearing requirements, and its decision was amply supported by uncontroverted competent, material and substantial evidence. We detect no evidence of arbitrariness or capriciousness.

Dr. Guess strenuously argues that many countries and at least three states recognize the legitimacy of homeopathy. While some physicians may value the homeopathic system of practice, it seems that others consider homeopathy an outmoded and ineffective system of practice. This conflict, however interesting, simply is irrelevant here in light of the uncontroverted evidence and the Board's findings and conclusion that homeopathy

is not currently an "acceptable and prevailing" system of medical practice in North Carolina.

While questions as to the efficacy of homeopathy and whether its practice should be allowed in North Carolina may be open to valid debate among members of the medical profession, the courts are not the proper forum for that debate. The legislature may one day choose to recognize the homeopathic system of treatment, or homeopathy may evolve by proper experimentation and research to the point of being recognized by the medical profession as an acceptable and prevailing form of medical practice in our state; such choices, however, are not for the courts to make.

We stress that we do not intend for our opinion in this case to retard the ongoing research and development of the healing arts in any way. The Board argues, and we agree within our admittedly limited scope of medical knowledge, that preventing the practice of homeopathy will not restrict the development and acceptance of new and beneficial medical practices. Instead, the development and acceptance of such new practices simply must be achieved by "acceptable and prevailing" methods of medical research, experimentation, testing, and approval by the appropriate regulatory or professional bodies.

III.

Dr. Guess also argues that N.C.G.S. § 90-14(a)(6) is unconstitutionally vague, because a reasonably intelligent doctor will not know whether he is engaging in unprofessional conduct each time he tries a new or different medical practice not widely used in North Carolina. *See*

In re Wilkins, 294 N.C. 528, 548, 242 S.E.2d 829, 841 (1978), *criticized on other grounds by In re Guess*, 324 N.C. 105, 376 S.E.2d 8 (1989). We have previously held that the predecessor statute to the current N.C.G.S. § 90-14 was neither vague nor overbroad. *Id.* at 546-49, 242 S.E.2d at 839-41. For reasons similar to those expressed in *Wilkins*, we conclude that any reasonably intelligent licensed physician will know when he is engaging in a practice which does not conform to "the standards of acceptable and prevailing medical practice" in North Carolina. Our conclusion is buttressed by the hearing testimony before the Board, where several doctors testified without hesitation that the practice of homeopathy does not conform to the standards of acceptable and prevailing medical practice in North Carolina.

IV.

Dr. Guess next contends that the Board's decision unconstitutionally invades his and his patient's privacy rights, by invading Guess' right to select his method of practice and invading his patients' rights to their choice of treatments. We disagree on both points. Regarding Guess' ability to select his method of practice, "there is no right to practice medicine which is not subordinate to the police power of the states." *Lambert v. Yellowsley*, 272 U.S. 581, 596, 71 L.Ed. 422, 429 (1926) (citing cases). Further, the Board's decision does not deprive Guess of his privilege to practice medicine, it simply limits his methods of treating patients to those which conform to the acceptable and prevailing standards of medical practice in North Carolina. Regarding Guess' claim that the Board's decision invades his patients' right to select the treatment of

their choice, we initially note that he has no standing to raise his patients' privacy interests in this regard. *See Stanley, Edwards, Henderson v. Dept. Conservation & Development*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (citing cases), *limited on other grounds by Madison Cablevision v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989). Further, we have recognized no fundamental right to receive unorthodox medical treatment, and we decline to do so now. *See State v. Howard*, 78 N.C. App. 262, 269, 337 S.E.2d 598, 603 (1985), *disc. rev. denied, appeal dismissed*, 316 N.C. 198, 341 S.E.2d 581 (1986).

V.

Finally, Dr. Guess contends that by denying him the opportunity to practice homeopathy, the Board is exercising unbridled and unconstitutional monopoly power. We disagree. The Board's authority to regulate the practice of medicine creates no unconstitutional monopoly. *See State v. Call*, 121 N.C. 643, 646, 28 S.E. 517, 517 [sic] (1897); *State v. Howard*, 78 N.C. App. at 266, 337 S.E.2d at 601.

VI.

The order of the Board of Medical Examiners allowed Dr. Guess to continue practicing medicine so long as he refrained from practicing homeopathy and otherwise conformed to the standards of acceptable and prevailing medical practice in North Carolina. The Superior Court erred in reversing and vacating the Board's decision, and the Court of Appeals erred in its decision affirming the Superior Court. The decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals

for its further remand to the Superior Court, Wake County, for proceedings consistent with this opinion.

Reversed and remanded.

Justice FRYE dissenting.

The underlying and essential question in this case is whether the Board may revoke a physician's license to practice medicine for "unprofessional conduct" under N.C.G.S. § 90-14(a)(6) based on a deviation from "the standards of acceptable and prevailing medical practice" without a finding that the deviation carries with it a potential for harm to the physician's patients or to the public. The Court of Appeals held that the Board may not do so. I agree and therefore dissent from the majority's holding to the contrary.

I believe that the majority has construed subsection (6) of N.C.G.S. § 90-14(a) in a manner inconsistent with its purpose and legislative intent. N.C.G.S. § 90-14(a) provides that the Board shall have the power to deny, annul, suspend, or revoke a physician's license to practice medicine in this State for any of some thirteen reasons. In addition to "unprofessional conduct," a license may be revoked for immoral or dishonest conduct; for producing or attempting to produce an abortion contrary to law; for making false statements to the Board; for being unable to practice medicine with reasonable skill and safety to patients by reason of illness, drunkenness, etc.; for conviction of a crime involving moral turpitude; for making false representations in order to obtain practice, money or anything of value; for advertising or publicly professing to treat human ailments under a system or school of treatment or practice other than that for which the person

has been educated; for mental incompetency; for lack of professional competence to practice medicine with a reasonable degree of skill and safety for patients; for promotion of the sale of drugs, etc., in such a manner as to exploit the patient for financial gain; upon suspension or revocation of a license to practice medicine in another state; or for failure to respond, within a reasonable period of time and in a reasonable manner, to inquiries from the Board concerning any matter affecting the license to practice medicine. Even a cursory review of subsection (6) shows that it is directed to protecting the health and safety of patients and the public. The common thread running through each of these reasons for revocation of a license is the threat or potential for harm to patients and the public.

Subsection (6) of N.C.G.S. § 90-14(a) provides that the Board shall have the power to deny, annul, suspend, or revoke a physician's license for:

> (6) unprofessional conduct, including, but not limited to, any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, or the committing of any act contrary to honesty, justice or good morals, whether the same is committed in the course of his practice or otherwise, and whether committed within or without North Carolina[.]

The majority treats the language "irrespective of whether or not a patient is injured thereby" as meaning irrespective of whether there is an injury or threat of injury

caused by the deviation. I do not believe that the legislature so intended. Dr. Guess argues, and I agree, that this language gives the Board authority to act before injury occurs, but does not eliminate the public purpose requirement that the medical practice pose some threat or potential for harm to the public. The phrase "unprofessional conduct" connotes dishonorable or unethical behavior, *In re Wilkins*, 294 N.C. 528, 242 S.E.2d 829 (1978), and, in the context of the statute, means substandard medical practice that cannot be tolerated because of the risk of harm such treatment poses to the public. Subsection (6), like the remainder of section 90-14(a), was enacted for the purpose of regulating the medical profession to protect the public health and safety and not simply to prevent a doctor from being the first one in the State to use a particular medicine or form of healing.

A careful examination of the evidence presented before the Board shows that Dr. Guess' practice of homeopathy is not unprofessional conduct within the meaning of N.C.G.S. § 90-14(a)(6). All of the evidence tended to show that Dr. Guess is a highly qualified practicing physician who uses homeopathic medicines as a last resort when allopathic medicines are not successful. He takes 150 credits of continuing medical education approved by the American Medical Association every three years and from fifty to eighty hours of homeopathic continuing medical education each year. The homeopathic medications prescribed by him are listed in the Homeopathic Pharmacopoeia of the United States and are regulated by the United States Federal Food, Drug and Cosmetic Act. The homeopathic approach is often preferred, in Dr. Guess' words, "primarily because of its well

documented safety." This is not a case of a quack beguiling the public with snake oil and drums, but a dedicated physician seeking to find new ways to relieve human suffering. The legislature could hardly have intended this practice to be considered "unprofessional conduct" so as to revoke a physician's license in the absence of some evidence of harm or potential harm to the patients or to the public. Nothing in the record before the Board or this Court justifies so broad a sweep in order to secure the public "against the consequences of ignorance and incapacity as well as of deception and fraud." *See Dent v. West Virginia*, 129 U.S. 114, 122, 32 L.Ed. 623, 626 (1889).

I also disagree with the majority's conclusion that Dr. Guess's evidence presented to the Board concerning the efficacy of homeopathy and its use outside North Carolina was not relevant to the issue before the Board. North Carolina does not and should not exist as an island to itself. The evidence that homeopathy is accepted in other states and in other countries of the world and that it has a beneficial rather than harmful effect certainly ought to be of some significance to the Broad and to the citizens of this State concerned about the public health and safety. The majority rejects evidence of the legitimacy of homeopathy in other states and countries throughout the world as being irrelevant because homeopathy is not currently an acceptable and prevailing system of medical practice in North Carolina. This raises the legitimate question of how the acceptable and prevailing practice can be improved in North Carolina if we do not even consider what happens in other states and countries.

Lastly, I disagree with the majority's conclusion that Dr. Guess' remedy lay with the legislature. As I have

stated earlier, N.C.G.S. § 90-14(a) is intended to protect the public from harmful or dangerous practices. In light of this policy, I do not believe that the General Assembly would require a physician to undergo a possibly lengthy wait for legislative action while it is attending to other matters before allowing him to make non-dangerous, beneficial treatments available to members of the public who knowingly consent. Where there is no showing of danger, I do not believe specific legislative approval is a prerequisite to a physician engaging in a practice which is by all indications helpful when used wisely.

I vote to affirm the unanimous decision of the Court of Appeals.

APPENDIX B

IN THE COURT OF APPEALS

IN RE GUESS

[95 N.C. App. 435 (1989)]

IN RE: GEORGE A. GUESS, M.D., RESPONDENT

No. 8710SC618

(Filed 5 September 1989)

ON remand from the North Carolina Supreme Court by a decision reported at 324 N.C. 105, 376 S.E.2d 8 (1989).

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael E. Weddington and Susan M. Parker, for petitioner appellant.

Manning, Fulton & Skinner, by Howard E. Manning, Jr., for respondent appellee.

PHILLIPS, Judge.

This appeal by the North Carolina Board of Medical Examiners is from the judicial review of its decision sanctioning the respondent physician. When it was first here we declined to determine it, *In re Guess*, 89 N.C. App. 711, 367 S.E.2d 11 (1988), because G.S. 90-14.11, still in the books, directs that decisions of the North Carolina Board of Medical Examiners, after being reviewed by the Superior Court, be appealed to the Supreme Court, and because several years after G.S. 7A-27(b) authorized this Court to receive appeals from the judicial review of administrative decisions our Supreme Court in *In re Wilkins*, 294 N.C. 528, 242 S.E.2d 829 (1978), accepted an

appeal from the Superior Court's review of a decision by the North Carolina Board of Medical Examiners and stated that it had jurisdiction to do so. Our decision was vacated by the Supreme Court, which held that this Court had initial appellate jurisdiction over the appeal because the enactment of G.S. 7A-27(b) in 1967 in effect repealed G.S. 90-14.11, and we herewith determine it as directed.

The pertinent facts are few and essentially undisputed. Following notice and a hearing the Board of Medical Examiners of the State of North Carolina conditionally revoked the license of Dr. George Albert Guess, a specialist in family medicine situated in Asheville, to practice medicine in this state. The action was taken under G.S. 90-14(a), which authorizes the Board to suspend or revoke licenses to practice medicine for several improper activities or practices, one of which is–

> (6) Unprofessional conduct, including, but not limited to, any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, . . .

Proceeding under this provision the Board charged Dr. Guess with unprofessional conduct in that he customarily treated patients with preparations known generally as "homeopathic medicines," a practice not in accord with the standards of acceptable and prevailing medical practice in this state. From the evidence presented at the hearing the Board found that the charge had been sustained; *viz*, that in treating patients Dr. Guess customarily administered "homeopathic medicines" to his patients and that such administration was contrary to acceptable

and prevailing medical practices in this state. From these findings the Board concluded that Dr. Guess' utilization of homeopathic medicines in his practice was unprofessional conduct under G.S. 90-14(a)(6) and revoked his license to practice, but stayed the revocation upon the condition that he not use homeopathic medicines in his practice and otherwise conform to acceptable and prevailing medical practice in this state. Following Dr. Guess' appeal to the Superior Court the order was vacated upon findings and conclusions that the Board's findings of fact and conclusions of law were not supported by competent evidence and were arbitrary and capricious.

The Superior Court's findings and conclusions as to the Board's findings of fact have no basis, as the Board's principle findings of fact are not only supported by competent evidence, they are essentially undisputed. Dr. Guess himself testified that he frequently used homeopathic medicines in treating patients, several qualified North Carolina physicians testified that such use is contrary to the "standards of acceptable and prevailing medical practice" in this state, and no doctor testified otherwise; indeed, so far as the record indicates Dr. Guess is the only physician in North Carolina that administers homeopathic medicines to patients. Nor is the Board's conclusion of law that such departure from acceptable and prevailing medical practice was unprofessional conduct and a ground for punishment arbitrary and capricious, as the court ruled, for the Board's conclusion is based upon the provisions of G.S. 90-14(a) which explicitly state that "any departure" from the standards of acceptable and prevailing medical practice in this state is

unprofessional conduct and a ground for suspending or revoking a physician's license.

Nevertheless, we believe that the order vacating the Board's order is correct and we affirm it. We do this because the Board neither charged nor found that Dr. Guess' departures from approved and prevailing medical practice either endangered or harmed his patients or the public, and in our opinion the revocation of a physician's license to practice his profession in this state must be based upon conduct that is detrimental to the public; it cannot be based upon conduct that is merely different from that of other practitioners. For the General Assembly created the Board of Medical Examiners to "properly regulate the practice of medicine and surgery" in this state, G.S. 90-2; and since "[t]he State can only regulate for the protection of the public," *State v. McKnight*, 131 N.C. 717, 724, 42 S.E. 580, 582 (1902), its purpose could have only been to protect the public. Thus, implicit in the provisions granting the Board power to revoke a medical license for practices not in conformity with the standards of acceptable and prevailing medical practice in the state is the requirement that the nonconforming practices endanger or harm the public in some way. Without that implicit requirement G.S. 90-14(a)(6) would permit the Board of Medical Examiners to suspend the license of any physician whose methods or practices, though harmless or even beneficial to his patients and the public, differ in some particular from those of most practitioners. Such unqualified power by an administrative agency would be contrary to the public interest, and was not the legislature's to give in any event.

Emphasizing that G.S. 90-14(a)(6) expressly makes it unnecessary to establish that a patient was injured by any unapproved medical practice and makes departures from approved and prevailing medical practice unprofessional conduct and a ground for sanctions, the Board contends that the legislature intended thereby to require it to establish only a departure from accepted and prevailing medical practice before suspending or revoking a physician's license. This argument is rejected. In not making injury to a patient an element of improper medical practice that warrants suspension from the practice the General Assembly only recognized the commonly known fact that not every improper or even irresponsible act of a physician results in injury to a patient; and that it did not go farther and provide that potential harm to the public need not be established is an indication that it understood that innocuous departures from prevailing medical practice cannot be a ground for suspending or revoking a physician's license.

Our holding, therefore, is that: Before a physician's license to practice his profession in this state can be lawfully revoked under G.S. 90-14(a)(6) for practices contrary to acceptable and prevailing medical practice that it must also appear that the deviation complained of posed some threat of harm to either the physician's patients or the public. This decision, of course, is no bar to any future proceeding by the Board against Dr. Guess or any other medical practitioner based upon charges and evidence that practices or conduct contrary to approved and prevailing medical practices in this state have exposed either persons or the public to harm.

Affirmed.

Judges WELLS and PARKER concur.

APPENDIX C

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
86 CVS 510

IN RE:
GEORGE ALBERT GUESS, M.D.,
Petitioner

v.

ORDER

THE BOARD OF MEDICAL
EXAMINERS OF THE STATE
OF NORTH CAROLINA,
Respondent

THIS CAUSE coming on to be heard and being heard before the Honorable Robert L. Farmer, Resident Superior Court Judge, presiding at the May 13, 1987, Civil Session of Wake County Superior Court, upon hearing on the Petition for Judicial Review and Appeal filed by Petitioner pursuant to G.S. 90-14.8 and G.S. 90-14.10, without a jury and upon the record, and the Court, after review of the record, the evidence, exhibits, briefs of the parties and arguments of counsel, Howard E. Manning, Jr., Esq. for Petitioner and Michael E. Weddington, Esq. for Respondents, finds and concludes that the Decision, Findings of Fact, Conclusions of Law and Order of the Board of Medical Examiners of the State of North Carolina dated January 14, 1986, should be reversed in that they prejudice the substantial rights of Petitioner because said findings and decision are not supported by competent, material and substantial evidence and are arbitrary and capricious. The Court specifically finds and concludes that said Decision, Findings of Fact, Conclusions of Law and Order prejudice the substantial rights of Petitioner by

revoking his medical license in the State of North Carolina; that upon review of the record said Decision, Findings of Fact, Conclusions of Law and Order are not supported by competent, material and substantial evidence admissible under G.S. 90-1, *et. seq.*; and that upon review of the record said Decision, Findings of Fact, Conclusions of Law and Order revoking the medical license of Petitioner are arbitrary and capricious.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Decision, Findings of Fact, Conclusions of Law and Order of the Board of Medical Examiners dated January 14, 1986, be, and the same are, reversed and vacated.

This the 20 day of May, 1987.

/s/ Robert L. Farmer
Robert L. Farmer,
Judge Presiding

APPENDIX D

BEFORE THE BOARD OF MEDICAL EXAMINERS
OF THE
STATE OF NORTH CAROLINA

In re:	)	
GEORGE ALBERT GUESS, M.D.,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

THIS MATTER coming on for hearing and being heard before the Board of Medical Examiners of the State of North Carolina ("Board") on October 18, 1985 at Asheville, North Carolina and on December 2, 1985 at Raleigh, North Carolina; and the Board, having heard and considered the evidence presented in the form of testimony from Respondent and various witnesses and documentary exhibits; and having heard and considered the arguments of counsel; now makes the following Findings of Fact, Conclusion of Law and Order:

Findings of Fact

1. Respondent was duly licensed to practice medicine in North Carolina on June 13, 1978 and holds license no. 22573.

2. Respondent is specialty-board certified in the practice of family medicine.

3. Respondent conducts his practice in Asheville, North Carolina.

4. In his practice Respondent offers his services to the general public to diagnose or attempt to diagnose,

treat or attempt to treat, and prescribe for or administer to, or profess to treat human ailments, diseases and the like.

5. Respondent, in the course of his diagnosing or attempting to diagnose, treating or attempting to treat, prescribing for or administering to, or professing to treat human ailments, diseases and the like, regularly and customarily administers to his patients certain preparations known generally as "homeopathic medicines."

6. Respondent, in the course of his diagnosing or attempting to diagnose, treating or attempting to treat, prescribing for or administering to, or professing to treat human ailments, diseases and the like, regularly and customarily recommends to and prescribes for ingestion and consumption by his patients certain preparations known generally as "homeopathic medicines."

7. Respondent, in his utilization in his practice of certain preparations known generally as "homeopathic medicines," provides such preparations to, and is the source of supply for, his patients since such preparations are not generally available through retail pharmacies or other sources of medicinal supplies usually available to the general public.

8. Respondent's patients use, ingest and consume these preparations generally known as "homeopathic medicines" which Respondent administers, recommends and prescribes to and for them.

9. Respondent is the only licensee of the Board known to the Board who utilizes, in the course of diagnosing or attempting to diagnose, treating or attempting

to treat, prescribing for or administering to, or professing to treat human ailments, diseases and the like, certain preparations known generally as "homeopathic medicines."

10. N.C.G.S. §90-14(a)(6) provides that the Board has the power to "deny, annul, suspend, or revoke" a license to practice medicine issued by the Board for any of various reasons, including "[u]nprofessional conduct, including, but not limited to, any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice . . . irrespective of whether or not a patient is injured thereby."

11. For any of the 13 enumerated reasons set forth in N.C.G.S. §90-14(a), the Board may revoke a license, and "may limit the accused physician's practice of medicine with respect to the extent, nature or location of his practice as the Board deems advisable."

12. While a few other states have statutory schemes for the regulation of the practice of so-called "homeopathic medicine," no such statutory procedures exist in North Carolina.

13. The utilization by Respondent in his practice of medicine of certain preparations known generally as "homeopathic medicines" departs from and does not conform to the standards of acceptable and prevailing medical practice in this State.

Conclusions of Law

1. Respondent is engaging in the practice of medicine within the meaning of N.C.G.S. §90-18.

2. The utilization by Respondent in his practice of medicine of certain preparations known generally as "homeopathic medicines" constitutes unprofessional conduct within the meaning of N.C.G.S. §90-14(a)(6).

Order

1. License no. 22573 issued by the Board to Respondent is revoked effective five (5) days from the date upon which these Findings of Fact, Conclusions of Law and Order are signed by the Board.

2. The revocation of Respondent's license is stayed for a temporary period of three (3) years, after which such stay of revocation shall become permanent, provided that:

a. Respondent refrains from the use in his practice of medicine of certain preparations known generally as "homeopathic medicines"; and

b. Respondent conducts his practice of medicine in accordance with the standards of acceptable and prevailing medical practice in North Carolina; and

c. Respondent continues to be of high moral character; and

d. Respondent violates no state or federal laws.

SO ORDERED.

This the 14th day of January, 1986.

BOARD OF MEDICAL EXAMINERS
OF THE STATE OF NORTH
CAROLINA

By: /s/ Jack A. Koontz, M.D.
Jack A. Koontz, M.D.
President

ATTEST:

/s/ Bryant D. Paris, Jr.
Bryant D. Paris, Jr.
Executive Secretary

MEW:mbp/3-I

APPENDIX E

85 CVS 510

BEFORE THE BOARD OF MEDICAL EXAMINERS
OF THE STATE OF NORTH CAROLINA

IN RE:

GEORGE ALBERT GUESS, M.D.
Respondent

NOTICE OF APPEAL FROM
BOARD'S DECISION OF REVOCATION AND
PETITION FOR JUDICIAL REVIEW

NOW COMES, George A. Guess, M.D., Respondent, by and through counsel, pursuant to G.S. 90-14.8 and G.S. 150A-48, et seq. and hereby gives Notice of Appeal from the Findings of Fact, Conclusions of Law and Order and decision of the Board of Medical Examiners signed on January 14, 1986, a copy of which is attached hereto and incorporated by reference. This Notice of Appeal is from said Findings of Fact, Conclusions of Law and Order and decision of the Board of Superior Court of Wake County, North Carolina. The Order and decision revokes and limits the Respondent's right to practice medicine within the State of North Carolina and affects the substantial and material rights of the Respondent. Respondent further objects and excepts to the entry of said Findings of Fact, Conclusions of Law and Order in their entirety. Without limiting the foregoing, and in compliance with G.S. 90-14.8, the Respondent sets forth hereafter, in writing, the exceptions taken to the decision of the Board:

The Respondent, George A. Guess, appeals from, objects and excepts to the decision of the Board of Medical Examiners in that:

1. The Findings of Fact, Conclusions of Law and Order dated January 16, 1986 (hereinafter "decision ") are arbitrary and capricious and not supported by the evidence.

2. The decision of the Board of Medical Examiners to the effect that George A. Guess, M.D., in prescribing and engaging in the practice of homeopathic medicine is guilty of unprofessional conduction in violation of G.S. 90-14(a)(6) is unsupported by the evidence, against the weight of the evidence and error as a matter of law.

3. The decision of the Board of Medical Examiners to the effect that George A. Guess, M.D., in the utilization in his practice of medicine of certain preparations known as "homeopathic medicines" departs from and does not conform to the standards of acceptable and prevailing medical practice in the State of North Carolina is arbitrary, capricious, not supported by the evidence and is erroneous as a matter of law in that George A. Guess, M.D. has done nothing unprofessional in the conduct of his medical practice.

4. That the decision of the Board of Medical Examiners acknowledges that other states have laws permitting the practice of homeopathic medicine and that no such statute exists in North Carolina, but fails to acknowledge or accept that the practice of homeopathic medicine because it is so licensed and accepted by other states, constitutes an acceptable medical practice when practiced in North Carolina by a responsible physician as Dr. Guess.

5. That the decision of the Board of Medical Examiners effectively deprives George A. Guess, M.D., of the

right to practice homeopathic medicine as a healing and within the State of North Carolina in violation of Respondent's right as a licensed and competent physician to select medications in the treatment of his patients and as such violates Respondent's rights under the Constitution of the United States and the decisions of the U.S. Supreme court in *Doe v. Bolton,* 410 U.S. 179 and *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416.

6. The decision of the Board of Medical Examiners effectively prevents George A. Guess, M.D., or any licensed M.D. from utilizing homeopathic medicines or practicing homeopathic medicine within the State of North Carolina which is in violation of the legislative intent of the Medical Practice Act, G.S. 90-1, et. seq. and such actions are beyond the authority of the Board of Medical Examiners, are constitutional, are erroneous as a matter of law and are in direct contravention of North Carolina law. See reasons set forth in *State v. McKnight,* 131 N.C. 724 (1902).

7. The decision of the Board of Medical Examiners revoking Dr. Guess' license to practice unless he refrains from utilization of homeopathic medicines in his medical practice is in violation of his constitutional rights as expressed in *United States v. Evers,* 643 F. 2d 1043 (5th Cir. 1981) to autonomy in selection of medications for his patients and in violation of his patients constitutional rights to select their own treatment as discussed and recognized in *State v. McKnight,* supra, *England v. Louisiana State Board of Medical Examiners,* 259 F. 2d 626 (5th Cir. 1968), *Andrews v. Ballard,* 498 F. Supp. 1038 (Dis.Tas [sic], 1980) *Doe v. Bolton,* supra.

8. The decision of the Board of Medical Examiners barring Dr. Guess from practicing homeopathic medicine or utilizing homeopathic medicines and revoking his license for doing so is in violation of his fundamental right to privacy secured by the United States and the rights of his patients secured by the United States Constitution in that the decision is unnecessary, is not justified by any compelling state interest and is unjustified by the evidence in this case. Such decision constitutes an unnecessary, arbitrary and unsupported regulation unnecessary to the protection of the public and may not be permitted for the reasons enumerated in *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *State v. McKnight*, supra and violates Respondent's constituted rights.

9. The decision is erroneous and invalid in that it creates a monopoly in the practice of medicine by keeping out a legitimate, safe and recognized healing art in North Carolina and prevents Respondent from practicing and earning a living by utilization of homeopathic medicine and remedies as a healing art. *State v. McKnight*, supra.

10. The decision is erroneous and arbitrary in that the record does not show that homeopathic medicines as administered by Dr. Guess are not effective and therapeutic for his patients and therefore there is no justification in fact for revoking Dr. Guess' license or right to practice homeopathic medicine.

11. The decision is erroneous, arbitrary and capricious in that the Board was not justified in excluding homeopathic medicines from respondent's practice in that the greater weight of the evidence was to the effect

that Respondent's utilization of homeopathic medicines in his practice brought his patient's [sic] some relief from their suffering and ills and there was no competent evidence to the contrary.

12. The decision is in violation of G.S. 90-320 in that the decision prevents the Respondent from delivering to the public homeopathic medical treatment which, as a healing art, is by law to be made available to patients so that patients can be made [sic] their own decisions concerning their own health care, a right recognized as a matter of public policy by statute in North Carolina.

13. The decision is in violation of the Commerce Clause of the United States Constitution and the Equal Protection Clause of the United States Constitution and 42 U.S.C. 1983 and the Fourteenth Amendment in that it deprives the Respondent from being permitted to practice his livelihood and profession within North Carolina when homeopathic medicine is a recognized discipline and healing art for medical practitioners in other states of the United States.

14. The decision is unsupported by competent evidence showing that homeopathic medicines as administered by George A. Guess, M.D. are in effective [sic], harmful or otherwise a danger to the public or Dr. Guess' patients and thus the Board's interpretation that since Dr. Guess is the only physician in North Carolina practicing homeopathy makes homeopathy an unacceptable and non-prevailing standard of medical care, is unconstitutional, erroneous and unlawful interpretation of G.S. 90-14 (a)(6) and such decision cannot be sustained to revoke Respondent's license to practice.

15. The decision's application of G.S. 90-14(a)(6) and 90-14(a) to revoke Dr. Guess' license to practice and prevent the utilization of homeopathic remedies is not supported by the evidence, erroneous and unconstitutional in that it deprives the respondent of his right to practice his profession free of arbitrary and capricious regulation and the patient's right to elect their method of healing art as described in the decisions heretofore cited.

16. The decision is erroneous in that the Board failed to find the [sic] Dr. Guess's practice of medicine, including the utilization of homeopathic medicine was professional, competent and not in violation of G.S. 90-14(a)(6) or any other portion of G.S. 90-14.

17. The decision is erroneous in that the Board failed to find from the evidence that Dr. Guess was not engaged in unprofessional conduct as set forth in G.S. 90-14(a)(6) and that the charges were dismissed.

18. The decision is erroneous in that the Board disregarded the evidence, acted contrary to the law in the Memoranda furnished to the Board by Respondent incorporated herein by reference as Exhibits A and B.

19. The decision is erroneous and in violation of law in that it effectively and actually prohibits Dr. Guess or any pharmacist licensed in North Carolina from dispensing and prescribing homeopathic medicines which are medicines and drugs recognized by the U.S. Federal Food, Drug and Cosmetic Act, 21 U.S.C. §301 and which medicines and drugs are legal and available within the United States and which medicines and drugs are recognized by the Pharmacy Practice Act and defined in G.S. 90-87(12) as a drug.

20. The decision is erroneous in that it fails to permit Dr. Guess, a licensed and competent physician and homeopathic physician from practicing a recognized and accepted healing art and disregards the acceptance of homeopathy by other States of the United States, Great Britain and other countries of the world.

Petition for Judicial Review

This Notice of Appeal pursuant to G.S. 90-14 is to also be considered as Dr. Guess' Petition for Judicial Review from a Final Agency Decision pursuant to G.S. 150A-48, et seq. and Dr. Guess incorporates the foregoing exceptions and grounds of error to the decision of the Board's Decision and Order and Dr. Guess petitions the Superior Court of Wake County to review the Order and Decision of the Board of Medical Examiners to the extent allowed by law and by G.S. 150A-48, et seq. and applicable regulations in connection with his appeal and review.

WHEREFORE, the Respondent prays:

1. That the Superior Court of Wake County review the Findings of Fact, Conclusions of Law and Order of the Board of Medical Examiners of the State of North Carolina pursuant to G.S. 90-14.8 and G.S. §150A-48, et seq. as applicable.

2. That the Superior Court of Wake County enter an Order staying the Order of the Board of Medical Examiners pending appeal and judicial review.

3. That the Superior Court of Wake County, after appeal and judicial review, set aside the decision and Order of the Board of Medical Examiners dated January

14, 1986, in this matter, in its entirety and direct the charges against Respondent be dismissed.

4. For such other and further relief as to the Court may seem just and proper.

Respectfully submitted, this 17th day of January, 1986.

/s/ Howard E. Manning, Jr.
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